

6982

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

Proc.

FILE: B-190127

DATE: July 10, 1978

MATTER OF: Art Metal - U.S.A., Inc.

DIGEST:

1. Based on review of entire record of procurement for "systems" furniture, GAO concludes that reasonable ground exists for decision to negotiate under "exception ten" negotiating authority. Conclusion takes into account complexity of furniture, multiplicity of product lines, diversity of performance characteristics, and need for onsite, expert appraisal of suitable furniture for varying needs.
2. Although in report to Congress GAO has expressed views that--as matter of sound policy--GSA has not been obtaining goods at lowest possible price under multiple award contracting, GAO has never expressed view that GSA was without legal authority to use multiple awards so long as certain guidelines were followed. Based on review of multiple award contracts for systems furniture GAO concludes guidelines were followed.
3. GAO agrees with GSA's view that standard furniture is not equivalent of systems furniture in design or use for all locations notwithstanding that one official of GSA has expressed contrary views. GAO view is prompted by general rule recognizing primary authority in agencies to determine own needs, expression of requests for deviations from standard furniture use, and agencies' justifications for use of systems furniture.
4. Because of conclusions reached, use of systems furniture does not breach existing standard furniture contracts given stated restrictions for use of systems furniture.

5. RFP for systems furniture permitted companies which did not have established catalog or market prices to compete. In any event, even if some companies are effectively excluded from competition because of current product lines and marketing practices, circumstance does not mean that competition was improperly restricted since number of companies competed.
6. GAO cannot question GSA's decision that multiple-award contracting is more cost effective than use of individual agency contracts for systems furniture.

Art Metal - U.S.A., Inc., has protested the issuance of request for proposals (RFP) No. FEHP-M3-72098-N-9-16-77, issued by the General Services Administration (GSA) for "FSC Class 71: Systems Furniture" for the period November 1, 1977 (or date of award whichever is later), through October 31, 1978. The RFP also provided an option period of up to 2 additional years.

The "systems furniture" involved was described in four separate items in the RFP, as to which offerors were to propose brand name products, as follows:

"SYSTEM - In order to qualify for an award, a system shall consist of components that, when assembled, provide for a complete workstation. Such a workstation shall contain all the functional components necessary for the performance of the occupant's duties. At a minimum this would include: Worksurfaces (to include one at typing height); filing; storage (drawer & shelving); and privacy panels.

"Basic components that are in direct conflict with other items in the Federal Supply System such as free standing desks, run-offs, (clerical and secretarial), files, bookcases, storage cabinets, etc., will not be accepted.

* * * * *

"ANY GIVEN SYSTEM OF HARDWARE SHALL BE
OFFERED FOR ONLY ONE SPECIAL ITEM NUMBER

(ITEMS 1 THROUGH 4).

"(1) A system using free standing work and vertical storage assemblies with interlocking spanner panels.

"An office furniture system in which the storage components and work surface units are mounted between and are mechanically supported by end panels. Such a system allows for component selection and adjustment at the time of assembly. The components are structurally complete sub-assemblies which when grouped and spanned between the end panels form a free standing piece of furniture. These free standing items when used with or without additional panels define work station territory and privacy. - - - - -

"(2) A system using interlocking panels with suspended work surface and storage components.

"An office furniture system that is devised from a series of individual work stations. The work stations consist of vertical screens or panels that mechanically lock together to establish individual work station territory and privacy. The panels have provisions such as slotted standards, integral with the panels, to suspend off their face components such as writing surfaces, storage drawers, bookshelves or other storage devices. - - - -

"(3) A system using freestanding, self-contained work and storage assemblies.

"An office furniture system devised from work stations in which the work surfaces and storage units are built in each work station making that work station a complete and single unit of furniture. In doing so, the furniture forms the dividing walls and thus defines individual work station territory and privacy.- - - - -"

"(4) A system utilizing modular equipment combined with freestanding or interlocking panels.

"An office furniture system in which storage units such as files, bookshelves, and cabinets and work surfaces such as desks and credenzas are freestanding and individual pieces of furniture. These individual pieces are placed within freestanding partitions or partitions that mechanically fasten to each other, but not to the pieces contained within, to define individual work station territory and privacy.- - - - -"

Prospective offerors were informed that "award [would] be made on an item by item basis." Offerors were further informed:

"The Government may make multiple awards for the articles or services listed herein to those responsible offerors whose offers, conforming to the request for proposal, will be most advantageous to the Government, taking into consideration the multiplicity and complexity of equipment of various manufacturers and the differences in

performances required to accomplish - produce required end results, production distribution facilities, prices, compliance with delivery requirements, and other pertinent factors. Offerors are advised that ordering agencies will be subject to the following instructions:

"Where orders are placed at other than the lowest delivered price available for the type of article or service required, the ordering agencies shall justify such orders as provided in the Federal Property Management Regulations (41 CFR 101-26.406)."

GSA was to judge the "performance difference," "multiplicity and complexity of equipment," facilities, prices, and "other pertinent factors" from offerors' "catalogs and pricelists"* for the brand name products offered for items 1 through 4. These catalogs and pricelists were to be made part of the submitted proposals.

The RFP shows that the solicitation was negotiated under authority of 41 U.S.C. § 252(c)(10) (1970), which provides that contracts may be negotiated by the agency head (in this case the Administrator of GSA) "for property or services for which it is impracticable to secure competition." The Administrator's power, in this particular case, was exercised, under authority of 41 U.S.C. § 257(a) (1970), by four individuals, namely:

- (1) The Chief, Procurement Branch, Household Furniture Division, National Furniture Center.
- (2) The Director, Household Furniture Center, National Furniture Center.

* The RFP also provided that if quoted prices were not based on "established catalog or market prices" offerors were to submit cost or pricing data.

(3) The Director, National Furniture Center.

(4) The Chief, Technical Support Branch.

According to the mandate in Federal Procurement Regulations (FPR) § 1-3.210(b) (1964 ed. circ. 1) (concerning limitations on the authority described in 41 U.S.C. § 252(c)(10)) a determination and findings (D&F) justifying use of the authority was prepared. The D&F reads:

"In accordance with Section 302(c) (10) of the Federal Property and Administration Services Act of 1949, 63 Stat. 393, as amended (41 U.S.C. 252), I hereby make the following findings in regard to the procurement of office systems furniture under a controlled nonstores term contract. A more detailed definition of the items to be procured is set forth in Attachment I.

"The Federal Supply Service has no existing indefinite quantity contracts for Systems Furniture. At the present time, each agency with justifiable requirements for System Furniture is executing its own procurement.

"Many agencies have expressed the desire to have this type of furniture available from GSA. A large number of requests for waiver have been received in support of the use of Systems Furniture.

"The primary use of Systems Furniture is for open plan projects where space planning problems exist, flexibility is of great concern, energy conservation through task lighting is desired, or any of the other considerations that make a furniture system both necessary and desirable are present. Such considerations sometimes cannot be adequately

satisfied by the existing conventional furniture in FSS's Supply System.

"In agreement finalized on July 7, 1977, by the Commissioner of FSS and the Commissioner of PBS, a rational, logical approach for introducing Systems Furniture to the Federal Government under controlled conditions was outlined. A copy of this agreement is set forth as Attachment II.

"No Federal Specification currently exists for possible use in the competitive procurement of Systems Furniture.

"There are extensive differences between the numerous furniture systems presently on the commercial market: such as design, construction, dimensions, and functional capability. In view of these dissimilarities, development of any type of Federal Specification(s) for use in competitive procurement cannot be foreseen at this time.

"Control over this program will be effected by restricting authorization for placing orders against existing contracts to the National Furniture Center and/or one supporting regional procurement office.

"The first two years of this program will be used to develop a data base on cost, utility, and applications for Systems Furniture that can be used in the refinement of the program.

"It is emphasized that Systems Furniture is not considered suitable or necessary for all open planning uses. Conventional office furniture will continue to be available from the FSS Stores Stock Program and from Federal Supply Schedule contracts.

"Under the above circumstances the multiple award concept appears to be the most economical and logical means of entering into indefinite quantity contracts with the firms that are interested in supplying their commercial furniture system(s) to the Government and are willing to participate in this limited and controlled program.

"Upon the basis of the foregoing findings, hereby make the following determination:

"It is impractical, within the purview of Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 393, as amended, to secure competition by means of formal advertising for Systems Furniture.

"Multiple Award contracts for the items mentioned above may be negotiated by authorized contracting officers of Federal Supply Service."

The "rational, logical approach for introducing systems furniture to the Federal Government under controlled conditions" referenced in the D&F has been briefly described by the Director of the National Furniture Center as follows:

"The systems furniture program was developed in order to study the performance of various furniture systems in the Federal Government under controlled conditions. Only GSA will be authorized to place orders, therefore removing significant latitude from agencies desiring to use systems furniture. Prior to the acceptance of any project, and the ordering of furniture components by FSS/PBS, justification for the use of systems furniture, in lieu of 'standard furniture' will be required from the agency seeking systems furniture. At such time as a

project is approved, an agreement will be drawn up between FSS/PBS and the using agency. The intention of each project will be to gain some advantage(s), e.g., space savings, energy savings, flexibility, etc., that cannot be realized by using standard furniture. It is anticipated that such advantages will ultimately be translatable into dollar savings for the Government. The expected advantages will be weighted against any projected disadvantages."

GROUND OF PROTEST

(1) GSA's legal rationale for negotiating the requirement is erroneous because the rationale is founded on an incorrect standard. Contrary to GSA's position, the mere impracticability of drafting adequate specifications is not enough to justify negotiation under the cited statutory provision; rather, an agency must show under applicable regulation and GAO precedent that it is impossible to draft adequate specifications before justifying negotiation. The mere fact that present systems furniture products differ does not justify the conclusion that it is impossible--however difficult and inconvenient it might be--to draft specifications adequate for advertising requirements of systems furniture. GSA could draft systems furniture specifications requiring that manufacturers' products be interchangeable to eliminate one of the problems GSA foresees in drafting specifications. GSA adopted this approach in the specification involved in Boston Pneumatics, Inc., B-185000, May 27, 1976, 76-1 CPD 345.

(2) The proposed "multiple award" scheme of the RFP is improper because: (a) the scheme involves sole-source negotiation which is not justified because there are numerous existing sources for the components of systems furniture; (b) systems furniture is not compatible with standard furniture or systems furniture made by other companies--thus making the original systems contractor a sole source for replacement items; (c) multiple award contracting prevents the Government from realizing the "cost savings inherent in volume purchases of individual items based on full and free competition"; and (d) multiple-award contracting is improper where, as here, specifications for standard furniture are available.

(3) The RFP disregards existing Federal Supply Service requirements contracts for standard furniture the components of which constitute "systems furniture." Moreover, systems furniture exceeds agencies' "minimum quality" functional needs for office furniture. All functional needs can be satisfied through the use of standard furniture. Further, as to GSA's reasoning that "flexibility" and "energy conservation through task lighting show that standard furniture is not the same as systems furniture, nothing could be more flexible than compatible and interchangeable standard furniture components. On the other hand, since systems furniture is not interchangeable throughout the industry, by definition it is not flexible.

That standard furniture can satisfy all uses planned for systems furniture is shown in a GSA memo obtained by Art Metal. The memo, prepared by the Assistant Commissioner for Standards and Quality Control, Federal Supply Service, reads:

"* * * the function for which the property is required can be satisfied, in this instance, through the use of standard furniture presently in our system."

GSA admits that only "sometimes" does standard furniture not meet the Government's needs--thereby implying that standard furniture normally does satisfy these needs. The fact that standard furniture can meet governmental needs is shown by the solicitation's description of item 4, namely: "individual pieces" such as files, cabinets, work surfaces and desks which are to be placed within freestanding partitions but are not to be attached to the partitions. The only missing element is that the standard components would not come from the same manufacturer and could not, therefore, be considered "systems" furniture.

(4) The RFP improperly restricts offerors to those concerns with established commercial catalogs which have a history of substantial sales to the general public thereby excluding concerns like Art Metal whose sales

have been primarily to the Government for individual items of standard furniture rather than complete product lines of systems furniture.

(5) If a justifiable need exists for systems furniture, the agency concerned may request a waiver from GSA.

GSA RESPONSES

(1) GSA has negotiated the solicitation under authority of 41 U.S.C. § 252(c)(10) which allows negotiation "for property or services for which it is impracticable to secure competition." The authority properly may be invoked in the circumstances which are illustrated in FPR § 1-3.210(a)(1)-(15). For this procurement the circumstance justifying negotiation is described in paragraph 13, namely: "[W]hen it is impossible to draft for an invitation for bids adequate specifications or any other adequately detailed description of the required property or services."

It is impracticable to develop a specification for systems furniture since manufacturers' product lines generally are not interchangeable. If GSA were to ensure interchangeability, the resulting specification would likely be limited to only one, if any, of the furniture systems existing on the commercial market. On the other hand, a specification written broadly enough to encompass a large number of different systems would reduce significantly the possibility of product interchangeability.

Furthermore, in B-121925, B-122682, February 7, 1956, in an analogous situation, GAO approved the negotiation of multiple-award contracts for office equipment. The cited decision reads (at page 6):

"We understand, however, that the multiplicity and complexity of equipment offered by various manufacturers, such as in the office equipment field, is so great, and the differences in performance characteristics so difficult of appraisal,

as to require an expert survey to determine which individual machine or line is best adapted to meet the requirement of the Government in any particular situation. In these circumstances, we agree with the conclusion of your agency that the drafting of specifications sufficiently detailed to differentiate between the various items and lines is impossible from a practical standpoint, and that the only feasible way of fully providing for the needs of all Government agencies through the supply schedule is to negotiate a separate contract for each manufacturer's equipment. * * *

(2) The multiple-award scheme used here is appropriate. GAO has approved the scheme in B-121926, B-122682, supra.

(3) Systems furniture does not exceed agencies' minimum needs since it is capable of meeting certain needs--that is, "open space" planning projects--that cannot be met by standard furniture. To show "open space" planning needs differ among agencies, it is noted that the Department of Health, Education, and Welfare (HEW) prefers work surface and storage component adjustability without task lighting while the Department of Housing and Urban Development has identified task and ambient lighting as essential without the need for component adjustability. The number of procurements made by agencies for systems furniture--with or without GSA approval--shows that there are functions or requirements not adequately satisfied by standard furniture.

Moreover, GSA will ensure that ordering agencies' needs can only be met through nonstandard furniture by reviewing each proposed order under the systems furniture contracts. GSA will make sure that the using agency will gain some advantage(s), for example, space savings, energy savings, and flexibility, that cannot be met by standard furniture. For example, "open space" offices require individual work stations which provide privacy within a wall-free space and which can

accommodate special needs for built-in lighting. Thus, over a 2-year period GSA will evaluate the desirability of systems furniture and will try to minimize sole-source application by using more than one system in a given office. Finally, the solicitation expressly provides that basic furniture components in conflict with standard furniture of the Federal Supply Schedule will not be accepted.

(4) Offerors can submit cost data to substitute for prices in commercial catalogs. Moreover, several companies submitted proposals in response to the solicitation showing that competition was not improperly restricted.

(5) The waiver system for processing systems furniture requests has not always resulted in cost savings to the Government; the current solicitation will ensure savings.

ANALYSIS

(directed to the above-numbered issues)

(1) In B-121926, B-122682, supra, we specifically recognized the practical impossibility of drafting specifications for the office equipment product line, recognizing the multiplicity, complexity, and performance characteristics of the offered equipment, and the need for expert appraisal as to the suitability of use of a given product for a given location. It is implicit in GSA's reliance on the cited case that it views the multiplicity and complexity of systems furniture as similarly constituting a practical present bar to develop adequate specifications.

Recognizing that the complexity of supplies or services does not per se bar the use of formal advertising (Sorbus, Inc., B-183042, July 12, 1976, 76-2 CPD 31), we have, at the same time, not objected to a negotiation decision under the statutory exception involved here "where any reasonable ground for the

determination exists." Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215; 41 Comp. Gen. 484, 492 (1962). Based on our review of the entire record we must conclude that, under the present circumstances, a reasonable ground exists for the decision to negotiate.

There is no question that the individual product lines of systems furniture offered by manufacturers differ as to the critical considerations of complexity, performance characteristics, and multiplicity. Although the presence of complexity does not necessarily justify a conclusion that it is impossible to draft specifications, complexity coupled with multiplicity of product lines, diversity of performance characteristics and the need for on-site, expert appraisal of suitable systems for varying product needs, does reasonably support the determination arrived at by GSA. ^{1/} Thus, a mandated specification requirement for "interchangeability" is not a practical cure at the present time for the problems related to the complicated product lines involved here. Contrast Boston Pneumatics, Inc., supra.

(2) Although in a report ^{2/} to the Congress we have recently expressed views that--as a matter of sound policy--GSA was not obtaining goods at the lowest possible price under multiple-award contracting, we have never expressed the view that GSA was without legal authority to employ this method of contracting so long as certain guidelines were followed. As we stated in B-121926, B-122682, supra, at page 7:

"If such [multiple-award] contracts are so drafted as to make it clear that the Government's obligation to each contractor is to purchase under the contract such of the products of the particular make as may be required during the period of the contract, we believe that such 'sole source' contracts would be valid and proper, even though other contracts should be contemporaneously in effect

^{1/} The fact that one GSA official has taken issue with the final GSA position on this and other related issues does not per se refute the GSA rationale.

^{2/} "Federal Supply Service Not Buying Goods at Lowest Possible Price," March 4, 1977, PSAD-77-69.

for other equipment of the same general type. It should also be made clear both to the contractors and to the purchasing agencies that the choice between similar items of the several lines would be made by the Government on the basis of administrative determination as to the one best suited to the particular needs of the agency. The agencies should be put on notice by appropriate provisions in each schedule that where the requirements in any instance would be substantially met by more than one make of equipment the choice would be governed by price, and that they should be prepared to furnish proper justification for any purchase made of such equipment at other than the lowest price available. Also we feel that, for the purpose of obtaining full and free competition for the Government as required, bidders should be advised of this instruction in connection with each invitation."

Any contract awarded under the subject RFP would be a "sole source"* contract for a particular product line of systems furniture. The RFP also incorporated by reference "41 CFR 101-26.408" (multiple-award contracts) which provides (at paragraph - 2):

* Although multiple-award contracts are "sole-source" for the particular product line involved in the contract, to the extent GSA obtains competition under the RFP for the several sole-source contracts awarded, elements of competitive negotiation are also present. For example, we understand several concerns commonly compete for multiple-award contracts and, so far as price is concerned, a "benchmark" pricing technique is used in which some offered prices are rejected as too high. As to possible "sole-source" effects resulting after award, we approve GSA's stated intent to lessen these effects through use of more than one systems contract for given installation.

"Each purchase * * * from a multiple-award schedule * * * shall be made at the lowest delivered price * * * unless the agency fully justifies the purchase of a higher priced item."

Thus, GSA's practice in this procurement conforms with the guidelines for multiple-award contracting in the cited decisions. Consequently, we must reject Art Metal's objections against the propriety of this form of contracting.

(3) For the reasons stated in GSA's response to the protest, we do not agree that standard furniture is the equivalent of systems furniture in design or use for all locations notwithstanding that a GSA official has expressed opinion to the contrary. Our conclusion is supported, in part, by GSA's recital of the number of requests for deviations from use of standard furniture. Concerning item 4--the description of which Art Metal considers to involve standard furniture only--GSA informs us that three offers received for the item were rejected because they described standard furniture. Further, GSA apparently intends not to use this item description in future solicitations for systems furniture. Assuming the validity of Art Metal's objection against this item, GSA has, therefore, implicitly agreed with the objection. This implicit acceptance, however, does not affect our view concerning the propriety of the other item descriptions which are independent of item 4.

As to the argument that systems furniture exceeds agencies' reasonable needs, we do not agree. Based on review of the entire record and noting GSA's expressed intent of reviewing agencies' proposed use of systems furniture, there seems to be adequate support for the proposition that some agencies' needs are not overstated when expressed through systems furniture giving due weight to the well-established position that agencies' needs are primarily for determination by the agencies themselves. Emerson Electric Company, B-187986, June 7, 1977, 77-1 CPD 404.

Because of our conclusion, we do not agree that the first three item descriptions of the RFP disregard existing standard furniture contracts as suggested by Art Metal given GSA's stated restrictions for use of systems furniture.

(4) We agree with GSA that the RFP permits companies which do not have established catalog or market prices to compete by submitting a description of the offered products with appropriate cost data. Even if some companies are effectively excluded from competition because of current product lines and marketing practices, this circumstance does not mean that competition was improperly restricted if a number of companies, as here, have submitted proposals. See Idaho Forest Industries, Inc., B-189676, December 27, 1977, 77-2 CPD 504.

(5) We cannot question GSA's decision that the waiver system for individual agency contracts for systems furniture is not cost effective when compared to multiple-award contracting.

In light of our conclusions, Art Metal's objections to GSA's decision to award notwithstanding the pendency of its protest are rendered academic. See Loughman, B-187148, December 15, 1976, 76-2 CPD 494.

Although we have agreed with GSA's views that under the present circumstances it is practically impossible to draft specifications for formal advertising, it may well be possible for GSA to draft specifications after the "data base" on this furniture is compiled 2 years from now. The specifications so drafted might describe more than one line of systems furniture so as to take into account varying agencies' needs as well as needs for interchangeable furniture.

We are therefore recommending to GSA that one of the goals of the next 2 years' program also be the gathering of data sufficient to eventually enable the drafting of specifications suitable for advertising procurements of this furniture.

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Protest denied.

R. F. Kistner
Deputy Comptroller General
of the United States